

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KLAMATH-SISKIYOU WILDLANDS
CENTER, CENTER FOR BIOLOGICAL
DIVERSITY, and KLAMATH FOREST
ALLIANCE,

Plaintiffs,

v.

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION,
NATIONAL MARINE FISHERIES
SERVICE, and UNITED STATES FISH
AND WILDLIFE SERVICE,

Defendants,

and

FRUIT GROWERS SUPPLY
COMPANY,

Defendant-Intervenor.

Case No. [13-cv-03717-NC](#)

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 53, 63, 66

The Endangered Species Act makes it unlawful for any person to “take” members of an endangered or threatened species. There is an exception: a person may obtain a permit to take a species, if such taking is incidental to the proposed activity and the applicant presents plans to minimize and mitigate its impact. Here, the primary issue is whether or not a permit applicant should be allowed to piggyback off of the conservation work of a non-applicant neighbor.

Case No.: [13-cv-03717-NC](#)

Plaintiffs Klamath-Siskiyou Wildlands Center, Center for Biological Diversity, and Klamath Forest Alliance (collectively “KS Wild”) allege that defendants U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively “the Services”) improperly issued 50-year incidental take permits to defendant-intervenor Fruit Growers Supply Company to take two “threatened” species: the northern spotted owl and the Southern Oregon/Northern California Coast coho salmon. KS Wild alleges multiple violations of the Endangered Species Act and the National Environmental Policy Act.

KS Wild’s key allegation is that Fruit Growers wrongfully obtained an incidental take permit by piggybacking off of the U.S. Forest Service’s conservation efforts on neighboring lands.

In discussing the ESA issues, the Court first tackles KS Wild’s claims associated with the northern spotted owl. Those claims involve the issue of whether or not the U.S. Fish and Wildlife Service arbitrarily and capriciously issued an incidental take permit to Fruit Growers. The Court also discusses whether FWS erred in issuing a biological opinion that found Fruit Growers’ plan to harvest timber would not likely jeopardize the northern spotted owl’s continued existence or result in the destruction or adverse modification of critical habitat.

Next, the Court looks at the ESA claims concerning the Southern Oregon/Northern California Coast coho salmon (“coho salmon”).¹ KS Wild argues that the National Marine Fisheries Service made an arbitrary and capricious finding in its biological opinion that Fruit Growers’ proposed timber-harvesting activities would not jeopardize the continued existence of coho salmon. In particular, KS Wild argues that the Services failed to account for the coho salmon’s short three-year lifespan in its “no jeopardy” analysis. KS Wild also argues that NMFS’s finding that Fruit Growers satisfied the “minimize and mitigate”

¹ NMFS determined that the Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of coho salmon (*Oncorhynchus kisutch*) is a “species” under the ESA. 62 Fed. Reg. 24588 (May 6, 1997). An ESU is a “distinct population segment.” 62 Fed. Reg. at 24588. There are many distinct population segments of coho salmon. But for the purposes of this Order, the term “coho salmon” will refer only to the Southern Oregon/Northern California Coast ESU of coho salmon.

1 requirement under § 10 was arbitrary and capricious.

2 Finally, the Court examines KS Wild's claims that the Services violated the
3 National Environmental Policy Act. Under NEPA, the reviewing agency must issue an
4 "environmental impact statement" that measures the cumulative effects of the
5 environmental action. The Court examines the question of whether the Services' joint
6 Final Environmental Impact Statement conducted a sufficient cumulative effects analysis
7 of Fruit Growers' proposed actions—its timber harvest projects, its plan to use herbicides,
8 and its plan to perform water withdrawal projects. The Court then looks at KS Wild's
9 contention that Fruit Growers violated NEPA by failing to release certain economic data
10 about Fruit Growers, and by failing to quantify its findings as to the environmental
11 consequences of Fruit Growers' proposed action.

12 For the reasons explained below, the Court GRANTS KS Wild's summary
13 judgment motion and finds the incidental take permits issued by the Services, the
14 biological opinion issued by NMFS, and the Final Environmental Impact Statement
15 invalid. But the Court DENIES KS Wild's summary judgment motion to invalidate the
16 FWS biological opinion. Accordingly, the Services' cross-motion for summary judgment
17 is DENIED as to all issues except the claim involving the FWS biological opinion's
18 validity. As to that claim, the Services' cross-motion is GRANTED.

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I. BACKGROUND

A. Statutory Framework

1. Endangered Species Act

Congress enacted the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544, “to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). In accordance with this policy, the ESA directs the Secretary of the Interior or the Secretary of Commerce to list endangered and threatened species. ESA § 4(a), 16 U.S.C. § 1533(a). Section 9 of the ESA makes it unlawful for any person to “take” a species that has been listed. ESA §§ 9(a)(1)(B) and (G), 16 U.S.C. §§ 1538(a)(1)(B) and (G).

Defined broadly, “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” ESA § 3(19), 16 U.S.C. § 1532(19); see *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995) (“Congress intended ‘take’ to apply broadly to cover indirect as well as purposeful actions.”). The regulations further define the term “harass” as an “intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. The regulations define “harm” as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” *Id.*

There is an exception to the ESA’s § 9 prohibition on taking. Section 10 of the ESA gives wildlife Services the discretion to issue a permit that allows a private individual to take a species, “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B).

Before the Services can issue this “incidental take permit,” the permit applicant must submit a “Habitat Conservation Plan.” This Plan must show that “the applicant will,

to the maximum extent practicable, minimize and mitigate the impacts of the taking,” and that “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” ESA § 10(a)(2), 16 U.S.C. § 1539(a)(2). The Secretary² cannot approve an incidental take permit unless he or she determines that the applicant has satisfied these statutory conditions.

In addition, § 7 of the ESA requires federal agencies to consult with either FWS or NMFS to ensure that any action authorized or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat of the species. ESA § 7, 16 U.S.C. § 1536. This process requires the Services to prepare a biological opinion that includes a finding as to whether the proposed action is likely to jeopardize the continued existence of an endangered or threatened species or its habitat. 50 C.F.R. § 402.14. Only after the Service makes this “no jeopardy” finding can it issue an incidental take permit to the applicant.

2. National Environmental Policy Act

Congress passed NEPA to protect the environment by requiring that federal agencies scrupulously weigh environmental considerations, and consider potential alternatives to proposed actions before the government launches a major federal action. *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005).

Instead of substantive outcomes, NEPA imposes procedural requirements on actions by federal agencies. *Id.* (citation omitted). For proposed major federal actions—where there is no dispute that the proposed action qualifies as such—NEPA requires the agency to prepare an environmental impact statement. 42 U.S.C. § 4332. “NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed

² This term refers to either the Secretary of the Interior or the Secretary of Commerce. “The Fish and Wildlife Service (FWS) administers the ESA with respect to species under the jurisdiction of the Secretary of the Interior, while the National Marine Fisheries Service (NMFS) administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 651 (2007) (citing 50 CFR §§ 17.11, 222.101(a), 223.102, 402.01(b)).

1 action . . . [and] inform the public that it has indeed considered environmental concerns in
2 its decisionmaking process.” *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300
3 (9th Cir. 2003) (internal quotation marks omitted). “In order to accomplish this, NEPA
4 imposes procedural requirements designed to force agencies to take a ‘hard look’ at
5 environmental consequences.” *Id.*

6 **B. The Threatened Species**

7 **1. Northern Spotted Owl**

8 The northern spotted owl inhabits “structurally complex forests” from southwestern
9 British Columbia through Washington and Oregon to northern California. 77 Fed. Reg.
10 71876, 71877-78 (Dec. 4, 2012); AR 35983. Dark brown with white spots, dark brown
11 eyes, and a barred tail, northern spotted owls are territorial and usually monogamous. 77
12 Fed. Reg. at 71883, AR 35984. They rely on older forested habitats that contain the
13 structures and characteristics required for nesting, roosting, foraging, and dispersal. 77
14 Fed. Reg. at 71884.

15 FWS listed the northern spotted owl as a “threatened” species in 1990 “because of
16 widespread loss of habitat across its range and the inadequacy of existing regulatory
17 mechanisms to conserve it.” *Id.* (citations omitted). In 2004 and 2011, FWS again
18 concluded that the northern spotted owl should remain listed as a threatened species. 77
19 Fed. Reg. at 71887-88. Notably, historical timber harvest and land-conversion have been
20 identified as the primary causes of an estimated 60 to 88 percent decline in northern
21 spotted owl habitat from the 1800s to 1990. AR 35986. Additionally, the northern spotted
22 owl faces a significant threat from the barred owl, which competes with the northern
23 spotted owl for habitat, food, and shelter. 77 Fed. Reg. at 71878. This competitive
24 pressure has “intensified the need to conserve and restore large areas of contiguous, high-
25 quality habitat” across the northern spotted owl’s range. 77 Fed. Reg. at 71879.

26 FWS first designated federal lands in Washington, Oregon, and California as
27 “critical habitat” for the northern spotted owl in 1992. 57 Fed. Reg. 1796 (Jan. 15, 1992).
28 This designation “identifies specific areas essential to the conservation of a species,” and

1 provides additional protection requirements under the ESA as to activities funded,
2 authorized, or carried out by a federal agency. 57 Fed. Reg. at 1797; ESA § 3(5)(A), 16
3 U.S.C. § 1532(5)(A). FWS revised these designations in 2008 and 2012. That latter
4 revision represented an increase in the total land area identified from previous designations
5 due to the northern spotted owl's "unanticipated steep decline." 77 Fed. Reg. at 71895.

6 **2. Southern Oregon/Northern California Coast Coho Salmon**

7 The SONCC coho salmon are anadromous fish, which means they migrate from the
8 sea to fresh water to spawn. Coho salmon have a three-year life cycle—they reach sexual
9 maturity at three years old, and then spawn before dying. AR 35966, 37658. They
10 naturally reproduce and spawn in streams between Punta Gorda, California, and Cape
11 Blanco, Oregon. 62 Fed. Reg. 24588 (May 6, 1997).

12 As a coldwater species, coho salmon require cool suitable water temperatures for
13 spawning and egg incubation. AR 35969. High water temperatures can reduce growth,
14 lead to egg loss, promote disease, and block upstream or downstream migration. AR
15 35969. Cool water temperatures are also necessary for juvenile coho salmon while rearing
16 in freshwater environments. AR 35969.

17 NMFS listed the SONCC coho salmon as "threatened" in May 1997. AR 35966
18 (citing 62 Fed. Reg. 24588). NMFS designated critical habit for the coho salmon in May
19 1999. 64 Fed. Reg. 24049 (May 5, 1999). This includes portions of areas affected by Fruit
20 Growers' Habitat Conservation Plan. AR 35966. NMFS identified logging, road building,
21 and water withdrawals as some of the major activities responsible for the coho salmon's
22 decline. 62 Fed. Reg. at 24592.

23 Indeed, such timber-harvest activities can alter stream features that support coho
24 survival. 62 Fed. Reg. at 24593. For instance, roads serve as a source of sediment to
25 streams. AR 37740-41. Sediment delivered to streams, in turn, can lead to reduced
26 reproductive success as well as reduced growth rates for coho salmon. AR 37743. NMFS
27 expressed "particular concern" over the "increased sediment input into spawning and
28 rearing areas that results from loss of properly functioning riparian areas, land

management activities that occur on unstable slopes, and certain agricultural practices.” 62
Fed. Reg. at 24592.

C. The Incidental Take Permits and the Supporting Documents

In 2009, Fruit Growers submitted an application to FWS for authorization under
ESA § 10 to take northern spotted owls on the company’s lands in connection with timber
harvest operations. AR 40133. Fruit Growers also submitted an incidental take permit
application to NMFS for authorization to take coho salmon, which could be affected by
logging activities. NMFS AR 150899. FWS and NMFS eventually issued incidental take
permits to Fruit Growers, allowing the company to take northern spotted owls and coho
salmon during the course of its logging activities. AR 40108-40110; NMFS AR 150875.
The permits last for 50 years.

The incidental take permits apply to 152,163 acres of Fruit Growers ownership. AR
35942. Fruit Growers manages its lands in northern California in three management units:
the Klamath River Management Unit, the Scott Valley Management Unit, and the Grass
Lake Management Unit. NMFS AR 150900. The Klamath River and Scott Valley
Management Units are located west of the Interstate 5 in Siskiyou County, California, and
the Grass Lake Management Unit is located east of the Interstate 5, north of Mt. Shasta,
and also in Siskiyou County. NMFS AR 150900.

Before granting the permits, however, the Services required Fruit Growers to
submit a Habitat Conservation Plan that specified several factors, including how Fruit
Growers planned to minimize and mitigate the take. In addition to reviewing the Plan, the
Services also issued an environmental impact statement under NEPA as well as a
biological opinion under the ESA. AR 38346 (Final Environmental Impact Statement);
AR 34071 (FWS biological opinion); AR 37604 (NMFS biological opinion).

1. Habitat Conservation Plan

Because Fruit Growers intended to take the northern spotted owl and the coho
salmon, the Habitat Conservation Plan presented separate strategies on how to conserve
each species.

1 First, the conservation plan's centerpiece to preserve the northern spotted owl,
2 known as the "Terrestrial Species Conservation Program," involved the creation of
3 Conservation Support Areas on Fruit Growers land. Fruit Growers lands are in a
4 "checkerboard" pattern: they consist of square blocks of land adjacent to federal lands
5 managed by the U.S. Forest Service or the Bureau of Land Management. AR 36000,
6 36002. These Conservation Support Areas consist of Fruit Growers' land located within
7 1.3 miles of an owl's "activity center"—that is, the center of the owl's "home range." AR
8 36133-41; AR 35942 (defining "activity center").

9 To support northern spotted owl reproduction, an owl's home range requires
10 appropriate amounts of nesting, roosting, and foraging habitat arrayed so that nesting pairs
11 can survive, obtain resources, and breed successfully. 77 Fed. Reg. at 71884; AR 35984.
12 While a home range can vary in size and shape, Fruit Growers' Plan characterizes the
13 home range as a circle drawn around a recognized northern spotted owl activity center
14 (roosting or nesting site). AR 35984. Thus, the parties also refer to home ranges as "owl
15 circles."

16 Each owl circle covers approximately 3,400 acres, which is equivalent to the area of
17 a circle with a radius of 1.3 miles. AR 35985. Northern spotted owls exhibit "central-
18 place foraging behavior," and, during breeding season, concentrate their activity mostly
19 within a "core area" surrounding the nest tree. 77 Fed. Reg. at 71887; AR 35985. This
20 "core area" of the owl circle covers 500 acres, which is equivalent to the area of a circle
21 with a 0.5 mile radius. AR 35985. Another way to think of the 3400-acre home range is
22 of a circle with an inner ring (0.5 mile radius) and an outer ring (1.3 mile radius).

23 Under the Fruit Growers Plan, the Conservation Support Areas, located within the
24 3400-acre owl circle, would provide "demographic support" to the conservation efforts of
25 surrounding landowners, namely the U.S. Forest Service. AR 36133-41. Indeed, the U.S.
26 Forest Service must manage these surrounding lands for the northern spotted owl as part of
27 the Northwest Forest Plan. AR 36265; *see also League of Wilderness Defenders Blue*
28 *Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1125 (9th Cir. 2010) ("[T]he

1 Forest Service developed the Northwest Forest Plan (NWFP) to protect and enhance old-
2 growth forest ecosystems in the Pacific Northwest and Northern California that serve as
3 habitats for numerous species.”).

4 Within the Conservation Support Areas, Fruit Growers would “promote and
5 maintain” general conditions and beneficial habitat features such as “[a]reas composed of
6 tree species associated with use by northern spotted owls (i.e., Douglas-fir with mistletoe
7 infections to provide nesting platforms, [and] hardwoods to provide food and shelter for
8 prey)” and “variable tree densities.” AR 36134. Timber harvest on the Conservation
9 Support Areas would be “restricted” and “any harvest . . . [would] require evaluation for
10 compliance with the [Habitat Conservation Plan] provisions, and written approval by
11 [FWS].” AR 36134.

12 The Plan identifies 24 owl circles where Fruit Growers would establish, maintain,
13 and manage Conservation Support Areas during the Plan’s 50-year term. By preserving
14 Conservation Support Areas in these 24 owl circles, the Plan would permit Fruit Growers
15 to harvest timber in another 58 owl circles. AR 36200. Even though there are fewer
16 circles with Conservation Support Areas than circles where logging would be permitted,
17 the Plan emphasized that the 24 owl circles have a higher conservation value and “high[er]
18 likelihood of owl use” than the other 58. AR 36138, 36200.

19 This conservation value was calculated using a number of factors, including the
20 activity center’s proximity to areas that FWS designated as northern spotted owl critical
21 habitat. AR 36193. According to the Plan, the 24 activity centers protected by the
22 Conservation Support Areas contribute 55 percent of the total conservation value of
23 activity centers in the area affected by the Plan. AR 36255-56. In contrast, the lower
24 quality activity centers, where take is allowed, represent only 18 percent of the total
25 conservation value. AR 36255-56. The Plan stressed that most northern spotted owls that
26 could be taken would come from activity centers with low conservation value: “the loss of
27 conservation value at these activity centers is mitigated at a 3:1 ratio (in conservation
28 value) by establishment of the [Conservation Support Areas].” AR 36256.

1 The second key part of the Plan is known as the “Aquatic Species Conservation
2 Program,” which contains measures designed to protect and conserve species of fish,
3 including coho salmon. AR 36102. For example, the strategy imposes “limitations on
4 equipment use in and around waters and wetlands to minimize erosion and sedimentation
5 and maintain hydrologic processes” along the miles of streams on Fruit Growers land that
6 contain coho salmon. NMFS AR 150901; *see also* AR 36099. It also includes a road
7 management plan, under which Fruit Growers must take steps to reduce sediment delivery
8 to streams from those roads by 50 percent within 10 to 15 years of issuance of the permits.
9 AR 36127.

10 **2. Environmental Impact Statement**

11 To further evaluate the Plan and the application, Fruit Growers and the Services
12 prepared a Draft Environmental Impact Statement as required by NEPA. 42 U.S.C. § 4321
13 *et seq.* The Services published a Notice of Availability of Fruit Growers’ Plan and Draft
14 Environmental Impact Statement in the Federal Register on November 13, 2009. AR
15 12680. In December 2009, the Services held public hearings on the proposed Plan and
16 Draft Environmental Impact Statement, and received public comments until February
17 2010. *Id.*; *see also* AR 38349. The Services published the Final Environmental Impact
18 Statement in June 2012. AR 37656.

19 **3. Biological Opinion**

20 During this time, both FWS and NMFS assessed whether issuing an incidental take
21 permit to Fruit Growers would likely jeopardize the continued existence of an endangered
22 or threatened species, or destroy or adversely modify designated critical habitat. *See* ESA
23 § 7(a)(2), 16 U.S.C. § 1536(a)(2). In making this determination, FWS and NMFS issued
24 biological opinions. Both concluded that the proposed permit would not jeopardize the
25 species or adversely modify critical habitat. AR 38177-38180; NMFS AR 150828.

26 Because of the numerous issues raised by the parties, the voluminous administrative
27 record consisting of tens of thousands of pages, and in the interest of judicial efficiency,
28 the Court will describe additional facts germane to the threatened species, the statutes, the

1 Plan, the biological opinion, and the Final Environmental Impact Statement, as necessary
2 as it goes through the parties' various claims.

3 **D. The Dispute**

4 On August 12, 2013, nine months after the Services issued incidental take permits
5 to Fruit Growers, KS Wild filed a complaint for declaratory and injunctive relief against
6 the Services. Dkt. No. 1. KS Wild alleged that the Services violated the Administrative
7 Procedure Act, the Endangered Species Act, and the National Environmental Policy Act.
8 Dkt. No. 1 at 2.

9 On August 1, 2014, KS Wild filed a motion for summary judgment seeking to
10 invalidate the incidental take permits, the associated biological opinions, and the Final
11 Environmental Impact Statement. Dkt. No. 53 at 13. In response, the Services filed a
12 cross-motion for summary judgment seeking to uphold the permits, the biological
13 opinions, and the Final Environmental Impact Statement. Dkt. No. 63 at 9. Fruit Growers,
14 who intervened in the case, joined the Services' opposition and cross-motion briefing and
15 filed a supporting brief. Dkt. No. 65.

16 On November 19, 2014, the Court held a hearing on the summary judgment cross-
17 motions. Dkt. No. 76.

18 **II. JURISDICTION**

19 As a threshold issue, this Court must determine whether the plaintiff organizations
20 Klamath-Siskiyou Wildlands Center, Center for Biological Diversity, and Klamath Forest
21 Alliance have standing to sue.

22 An organization "has standing to bring suit on behalf of its members when its
23 members would have standing to sue in their own right, the interests at stake are germane
24 to the organization's purpose, and neither the claim asserted nor the relief requested
25 requires individual members' participation in the lawsuit." *Friends of the Earth, Inc. v.*
26 *Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000).

27 For individual members to establish standing the individual must show: (1) an
28 "injury in fact" (2) that is fairly traceable to the challenged conduct of the defendants and

(3) the injury is likely to be redressed by a favorable court decision. *Natural Res. Def. Council v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014) (citing *Friends of the Earth*, 528 U.S. at 181). Additionally, the interests sought to be protected must arguably be within “the zone of interests” protected by the statute in question. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970).

Here, the Court finds that each plaintiff organization has established standing. Plaintiffs have submitted declarations based on the personal knowledge of members from plaintiffs Klamath-Siskiyou Wildlands Center, Center for Biological Diversity, and Klamath Forest Alliance.³ The members of these associations would otherwise have standing to sue in their own right. “Approval and implementation of the incidental take permits harms and will continue to harm” members of these associations “by reducing [the members’] enjoyment of forests and forest ecosystems in the areas surrounding [Fruit Growers] lands covered by [the Plan].” Dkt. No. 57 at 4 (Sexton Decl.); *see also, e.g.*, Dkt. No. 58 at 4 (Beckett Decl.) (stating that the Plan and the incidental take permit “greatly reduces my likelihood of viewing Northern Spotted Owls and Pacific fishers in their native habitat”).

Such interests are germane to the organizations’ purpose of advocating “for the forests, wildlife and waters of southern Oregon and northern California.” Dkt. No. 55 at 3 (Ruediger Decl.). Members of the organizations include avid hikers, campers, photographers, and ecologists, who spend a significant time in parts of the Klamath-Siskiyou region affected by the Plan. *See, e.g.*, Dkt. Nos. 58 at 3 (Beckett Decl.), 55 at 5-6 (Ruediger Decl.).

The Court can redress the members’ injuries in fact by invalidating the permits. *See, e.g.*, Dkt. No. 61 at 10 (Haines Decl.) (“Invalidating the [Plan] and incidental take

³ The Court considered plaintiffs’ declarations for the sole purpose of determining standing. Defendant-intervenor objects to the declarations’ use to the extent that the testimony offered goes beyond the record. Dkt. No. 63 (motion to strike portions of two declarations). The objection is overruled because the Court considered the declarations only for the issue of standing. Defendant-intervenor’s motion to strike is denied.

1 permits would help to redress my injuries by reinstating protections that benefit northern
2 spotted owls, their habitat, and the forest ecosystems in spotted owl habitat.”). Plaintiffs’
3 lawsuit does not require the participation of all of these individual members.

4 Finally, because plaintiffs’ claims seek to protect threatened species and their
5 habitat, plaintiffs’ interests fall clearly within the ESA’s and NEPA’s zone of interests.
6 *See Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079 (9th Cir. 2001)
7 (“the interests [plaintiff] seeks to protect in this litigation clearly fall within the zone of
8 interests contemplated by section 7(a)(2) of the ESA”); *W. Watersheds Project v.*
9 *Kraayenbrink*, 632 F.3d 472, 485-86 (9th Cir. 2011) (finding plaintiffs’ NEPA claims fall
10 within the statute’s zone of interest).

11 For these reasons, and, in particular, because “the case law is abundantly clear that a
12 minimal showing of detriment is all that is required to establish an injury in fact,” the
13 Court finds that the plaintiffs have established standing. *See Sierra Club v. U.S. Army*
14 *Corps of Eng’rs*, 935 F. Supp. 1556, 1570 (S.D. Ala. 1996); *see also Japan Whaling Ass’n*
15 *v. Am. Cetacean Soc’y*, 478 U.S. 221, 231 n.4 (1986) (holding that plaintiff whale watchers
16 alleged sufficient injury in fact by asserting that their ability to engage in whale watching
17 activities would be adversely affected by continued whale harvesting activities of the
18 defendant).

19 This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs, defendants,
20 and defendant-intervenors consented to the jurisdiction of a magistrate judge under 28
21 U.S.C. § 636(c). Dkt. Nos. 10, 18, 28.

22 **III. STANDARD OF REVIEW**

23 Summary judgment may be granted only when, drawing all inferences and
24 resolving all doubts in favor of the nonmoving party, there are no genuine issues of
25 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.
26 P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when,
27 under governing substantive law, it could affect the outcome of the case. *Anderson v.*
28 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine

1 if “the evidence is such that a reasonable jury could return a verdict for the nonmoving
2 party.” *Id.*

3 A court reviews final agency actions under the “arbitrary and capricious” standard
4 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Friends of Endangered*
5 *Species v. Jantzen*, 760 F.2d 976, 980-81 (9th Cir. 1985). Under the APA, the court
6 “shall” set aside any agency decision that it finds “arbitrary, capricious, an abuse of
7 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

8 An agency action is arbitrary and capricious if “the agency has relied on factors
9 which Congress has not intended it to consider, entirely failed to consider an important
10 aspect of the problem, offered an explanation for its decision that runs counter to the
11 evidence before the agency, or is so implausible that it could not be ascribed to a
12 difference in view or the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State*
13 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

14 Review under this “arbitrary and capricious” standard is narrow, and the reviewing
15 court may not substitute its judgment for that of the agency. *League of Wilderness*
16 *Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1215 (9th Cir. 2008). Despite this narrow
17 scope of review, the court’s inquiry must be “searching and careful.” *Marsh v. Or.*
18 *Natural Res. Council*, 490 U.S. 360, 378 (1989). Ultimately, “the agency must articulate a
19 rational connection between the facts found and the conclusions made.” *Or. Natural Res.*
20 *Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) (citing *U.S. v. Louisiana-Pac. Corp.*,
21 967 F.2d 1372, 1376 (9th Cir. 1992)).

22 **IV. DISCUSSION**

23 **A. Endangered Species Act**

24 **1. Northern Spotted Owl**

25 KS Wild asserts that the incidental take permit issued by the Fish and Wildlife
26 Service should be invalidated because the Secretary’s finding that Fruit Growers satisfied
27 the minimization and mitigation requirement was arbitrary and capricious. Likewise, KS
28 Wild argues that the biological opinion issued by FWS should be invalidated because its

no-jeopardy conclusion was based on false assumptions.

a. Incidental Take Permit

Congress provided an incidental take permit exception to ESA § 9 for takings that are incidental to, and not the purpose of, the execution of an otherwise lawful activity. ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B). As a prerequisite to receiving an incidental take permit, the applicant must submit a habitat conservation plan that specifies:

- (i) the impact which will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

ESA § 10(a)(2)(A)(i)-(iv), 16 U.S.C. § 1539(a)(2)(A)(i)-(iv). After opportunity for public comment, if the Secretary finds that the permit application and habitat conservation plan satisfies the following, the Secretary “shall” issue the permit:

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required under subparagraph (A)(iv) will be met;

ESA § 10(a)(2)(B)(i)-(v), 16 U.S.C § 1539(a)(2)(B)(i)-(v).

i. FWS’s “Minimize and Mitigate” Finding for “the Applicant”

ESA § 10(a)(2)(B)(ii) requires the Secretary to find that “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of [the proposed] taking” before issuing an incidental take permit to the applicant. ESA § 10(a)(2)(B)(ii), 16 U.S.C. § 1539(a)(2)(B)(ii). Determining whether an applicant meets this standard for minimizing and mitigating the take “typically requires consideration of two factors: adequacy of the

1 minimization and mitigation program, and whether it is the maximum that can be
2 practically implemented by the applicant.” *Habitat Conservation Planning and Incidental*
3 *Take Permit Processing Handbook* at 7-3 (“HCP Handbook”).⁴

4 Because the ESA is silent on the definition of “applicant,” the Court turns to the
5 regulations issued jointly by NMFS and FWS found at 50 C.F.R. § 402. There, the
6 Services define an “applicant” as “any person, as defined in section 3(13) of the [ESA],
7 who requires formal approval or authorization from a Federal agency as a prerequisite to
8 conducting the action.” 50 C.F.R. § 402.02; *see also, e.g., Haw. Longline Ass’n v. NMFS*,
9 2002 U.S. Dist. LEXIS 7263, at *14-15 (D.D.C. Apr. 25, 2002) (looking to 50 C.F.R. §
10 402 to define “applicant” in ESA claim). Section 3(13) of the ESA, in turn, defines the
11 term “person” as “an individual, corporation, partnership, trust, association, or any other
12 private entity; or any officer, employee, agent, department, or instrumentality of [any
13 federal, state, or municipal government] . . . subject to the jurisdiction of the United
14 States.” ESA § 3(13), 16 U.S.C. § 1532(13). Meanwhile, “action” is defined as “all
15 activities or programs of any kind authorized, funded, or carried out, in whole or in part, by
16 Federal agencies Examples include, but are not limited to . . . (a) actions intended to
17 conserve listed species or their habitat” 50 C.F.R. § 402.02.

18 Here, in evaluating Fruit Growers’ Habitat Conservation Plan, FWS found that
19 applicant Fruit Growers “will, to the maximum extent practicable, minimize and mitigate
20 the impacts of such taking” of the northern spotted owl. AR 40137 (FWS’s § 10
21 “Statement of Findings and Recommendations”); AR 40138 (finding the Plan “is expected
22 to effectively avoid, minimize, and to the extent take is likely to occur, mitigate the
23 impacts of take . . . and contribute to the recovery of the northern spotted owl population”).
24 FWS reached this conclusion based on several factors, with the primary mitigation
25

26 ⁴ While the HCP Handbook is not in the Administrative Record, KS Wild attached it as an
27 exhibit to its summary judgment filing, Dkt. No. 54-1, and it is a publicly available
28 document. Additionally, the Services agree that the Court may take judicial notice of this
document. Dkt. No. 63 at 19 n.6. Accordingly, the Court takes judicial notice of the HCP
Handbook.

measure involving the establishment of 24 Conservation Support Areas by Fruit Growers. Dkt. No. 63 at 20-22 (Services' cross-motion for summary judgment) (pointing to Conservation Support Areas as the main evidence for FWS's "minimize and mitigate" finding); Dkt. No. 76 (summary judgment hearing), Tr. at 11/19/14, 2:43-2:45 (counsel for the Services describing Conservation Support Areas as the "centerpiece" of FWS's five-part conservation strategy).

These Conservation Support Areas consist of Fruit Growers land located within the 24 approximately 3400-acre owl circles that Fruit Growers committed to maintaining and managing for the 50-year term of the Plan. Specifically, Fruit Growers committed to preserve a varying number of acres within each of the 24 Conservation Support Areas. For instance, within the owl circle labeled "SK002,"⁵ Fruit Growers would maintain and manage 211 acres of owl habitat within the 500-acre core area—which consists of nesting and roosting habitat—and a total of 931 acres within the entire 3400-acre owl circle. AR 36137 (table listing FGA habitat commitments in Conservation Support Areas). In contrast, in owl circle "SK238," Fruit Growers committed to maintaining 0 acres of habitat within the 500-acre core area and 66 acres within the whole owl circle. AR 36137. For each of these 3400-acre circles, the U.S. Forest Service owns the bulk of the non-Fruit Growers land. AR 34181-91.

Overall, FWS identified a total of 82 valid owl circles that would be affected by the Fruit Growers Plan. FWS assigned each of these owl circles—which together support an estimated total of 158 individual northern spotted owls—a "conservation value." AR 36190, 36194-96. FWS assessed the conservation value of each owl circle—expressed as a numeric score—using a formula that considered four variables: (1) the activity center's

⁵ The Habitat Conservation Plan refers to these labeled areas as "activity centers" and not "owl circles." Nonetheless, each activity center is surrounded by a home range in the form of a circle with a radius of 1.3 miles. In addition, the "Conservation Support Area Maps" in the Plan's appendix consist of images of circles for each of these numerically-labeled "activity centers." AR 36401-25. KS Wild in the glossary to their reply brief also describes "activity center" as a term referring to an "owl circle" or "spotted owl circle." Dkt. No. 73 at v. Thus, for the sake of simplicity, the Court will refer to these activity centers as "owl circles."

1 proximity to designated critical habitat; (2) the owl circle's reproductive status and history;
2 (3) the proportion of private land in the owl circle's inner (0.5-mile radius) and outer (1.3-
3 mile radius) rings; and (4) the owl circle's predicted probability of occupancy. AR 36193.
4 The scores range from the highest conservation value of 111 to the lowest value of 0. AR
5 36104-96. The higher the conservation value, the greater the importance of that owl circle
6 to preserving the northern spotted owl species.

7 As FWS concluded in its § 10 findings, Fruit Growers would establish Conservation
8 Support Areas on land owned by Fruit Growers that "focus primarily on activity centers
9 with the highest conservation value, to provide demographic support to owl populations"
10 on adjacent federal lands. AR 40138. FWS and Fruit Growers identified the locations of
11 the Conservation Support Areas in large part on the basis of those high conservation
12 values. AR 36193. And under the Plan, the Conservation Support Areas would serve as
13 "mitigation for incidental take of lower value activity centers." AR 36193.

14 In the final analysis, according to FWS, the reason why the Conservation Support
15 Areas would serve as "mitigation for incidental take" is that the expected taking by Fruit
16 Growers on lower value owl circles "[would] be *offset* by the conservation of high quality
17 northern spotted owl habitat" located within owl circles with the highest conservation
18 values containing the Conservation Support Areas. Dkt No. 63 at 20 (citing AR 40141
19 (emphasis added)). The Services identified 24 such owl circles to be protected by
20 conservation support; 43 owl circles where incidental take would take place; and another
21 15 owl circles where incidental take would be unlikely. AR 36200. After determining the
22 conservation value of each of the 82 owl circles, the Services identified the percentage of
23 the total conservation value contributed by each category of owl circle:

24 //

Table 1. Total Conservation Values Contributed by Each Category of Owl Circle

Category of Owl Circle	Number of Owl Circles	Total Conservation Value Score (approximate #)	% of Total Conservation Value
Protected by Conservation Support (contains Conservation Support Areas)	24	1,645	55%
Incidental Take is Unlikely	15	808	27%
Incidental Take is Likely	43	538	18%
Total	82	2,991	100%

AR 36194-96, 36200.

Looking at the data, and highlighting the 55 percent and 18 percent findings, FWS concluded that the “conservation value of the conserved CSAs is three times higher than the conservation value of the activity centers where take would be allowed (55:18 percent).” AR 40139. FWS further combined the total conservation value percentages for (a) the owl circles that would be protected by conservation support, and (b) the circles where incidental take is unlikely. It found that because “82 percent of the total conservation of all activity centers . . . would be retained and conserved under the [Plan],” AR 40139, any incidental take by Fruit Growers would be minimized and mitigated.

KS Wild attacks this analysis. In particular, KS Wild believes FWS wrongly “credited” Fruit Growers for the conservation value that the Forest Service—someone other than ‘the applicant’—would provide within the owl circles. Dkt. No. 53 at 34. Put differently, KS Wild argues that according to ESA § 10(a)(2)(B)(ii), FWS may only consider minimization and mitigation efforts of “the applicant,” which here is Fruit Growers; FWS may not factor into its conservation value analysis the minimization and mitigation efforts by neighboring landowners, which in this case consists of the Forest Service. By awarding Fruit Growers “credit” for preserving entire owl circles “even though most of the land in those areas is owned by someone other than [applicant Fruit Growers],” Dkt. No. 53 at 14, KS Wild contends that FWS “relied on factors which Congress has not intended it to consider”: actions by someone other than the incidental-

1 take-permit applicant, Dkt. No. 53 at 14 (quoting *Motor Vehicles*, 463 U.S. at 43). As KS
2 Wild explains, this renders FWS’s “minimize and mitigate” finding arbitrary and
3 capricious.

4 But according to the Services, there is no “credit” system by which FWS treated
5 Fruit Growers as if it owned acreage that belonged to the federal government or other
6 landowners. Dkt. No. 63 at 33-34. Indeed, the Services point out that the word “credit”
7 appears nowhere in the Plan. *Id.* at 34. The Services admit that FWS “simply included
8 federal lands in the calculation of each [owl circle’s] conservation value to help . . .
9 identify which [owl circles] should be a priority for conservation.” *Id.*

10 Yet according to the Services, just because adjacent federal lands happen to make
11 certain owl circles more valuable for owl conservation than others “does not mean that the
12 Forest Service is being treated as a co-applicant for the permit, or that incidental take
13 coverage extends to those federal lands.” *Id.* Instead, the Services argue that “[b]ecause
14 the Conservation Support Areas are adjacent to designated critical habitat and other high
15 value habitat on federal lands, the protection of which is the linchpin to recovery of the
16 Northern Spotted Owl under the 2011 Revised Recovery Plan,” FWS reasonably
17 calculated the conservation values of each owl circle, and properly applied that value in
18 developing the Conservation Support Areas. *See* Dkt. No. 63 at 34-35.

19 Counsel for the Services summed up the Services’ position at oral argument: “At
20 the end of the day, what is being analyzed and ‘credited,’ to the extent that is happening, is
21 what Fruit Growers is doing on its own land. Period.” Dkt. No. 76, Tr. at 11/19/14, 2:44-
22 2:49 .

23 The Court is not persuaded by this characterization, and finds that FWS improperly
24 attributed the conservation values of entire owl circles containing the Conservation
25 Support Areas to applicant Fruit Growers, despite the fact that Fruit Growers’ ownership
26 makes up only a fraction of entire owl circles. In doing so, the Services considered the
27 minimization and mitigation efforts of an entity other than “the applicant.”

28 “It is well established that when the statute’s language is plain, the sole function of

the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks and citations omitted); *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) (“[T]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.”).

Here, ESA § 10(a)(2)(B)(ii) states plainly that when issuing an incidental take permit, the Secretary must find that “*the applicant* will . . . minimize and mitigate the impacts of such taking” of an endangered or threatened species. ESA § 10(a)(2)(B)(ii), 16 U.S.C. § 10(a)(2)(B)(ii) (emphasis added). An “applicant,” in turn, is someone “who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.” 50 C.F.R. § 402.02. The “applicant” in this case is not the Forest Service or any other government entity. Fruit Growers is the only “applicant” under ESA § 10—it alone seeks formal authorization from FWS to pursue actions (e.g., logging) on its own lands without the risk of violating the ESA. AR 35942 (“[Fruit Growers] is applying to USFWS and NMFS for permits allowing incidental take of federally listed threatened species.”).

Nonetheless, in evaluating the applicant’s minimization and mitigation, FWS factored in the efforts by entities other than applicant Fruit Growers. This is best illustrated by looking at the conservation values for two specific owl circles: out of the 24 owl circles with Conservation Support Areas, the circles labeled “SK378” and “SK238” (attached to this Order as Exhibits 1 and 2, respectively) have the lowest number of acres that Fruit Growers committed to preserving—62 and 66, respectively—yet have the third highest and the highest conservation values—100 and 111, respectively. AR 36137, AR 36194.

For SK378, Fruit Growers committed to preserve 33 acres of habitat in the core nesting and roosting area, and a total of 62 acres of habitat in the entire 3400-acre owl circle. AR 36137. This means that for committing to preserve less than two percent of an

owl circle, Fruit Growers nevertheless benefited by having that circle's high conservation value score of 100 factored into FWS's calculation of the total conservation value for owl circles with Conservation Support Areas. This, despite the fact that the Forest Service owns over 2,500 acres (or nearly 75 percent) of that circle. AR 34188.

Similarly, owl circle SK238 presents stark results. The Plan required Fruit Growers to preserve 0 acres of core-area habitat, and only 66 acres of habitat for the entire 3400-acre circle. AR 36137. As KS Wild points out, despite Fruit Growers' marginal commitment to preserve less than two percent of the 3400-acre owl circle, and despite the fact that the federal government owns over 2,400 acres (or 70 percent) of that circle, AR 34184, FWS attributed the conservation value of 111 to Fruit Growers.

The Court summarizes these figures in the table below using approximate numbers:

Table 2. Fruit Growers-Supported Owl Circles with Lowest Habitat Commitments

Owl Circle	Total Acres in Owl Circle	Acres Owned by Forest Service	Acres Fruit Growers Committed to Preserve	% of Circle Owned by Forest Service	% of Circle Fruit Growers Committed to Preserve	Conservation Value
SK378	3400	2500	62	73.5%	1.8%	100**
SK238	3400	2400	66	70.5%	1.9%	111*

*Tied for highest conservation value out of 82 valid owl circles affected by Plan.

**Fourth highest conservation value out of 82 valid owl circles affected by Plan. And third highest among the 24 owl circles with Conservation Support Areas.

Highlighting these two owl circles is not cherry picking. For 17 of the 24 owl circles supported by Conservation Support Areas, Fruit Growers' Conservation Support Areas make up less than 15 percent of the total owl circle. AR 36194-96 (listing conservation value for all circles); AR 36137 (listing number of acres Fruit Growers committed to preserving in circles with Conservation Support Areas). Yet FWS attributed the conservation value of these owl circles to Fruit Growers by adding them to the total conservation value points in owl circles with Conservation Support Areas. *Compare* AR 36194-96 (listing conservation values for all circles and sum total conservation value) *with* AR 36200 (showing percentage of total conservation value contributed by each category of owl circle).

FWS then weighted the total conservation value for these 24 owl circles against the

1 total conservation value of owl circles where take is expected to occur. Even though for
2 all but seven of the 24 owl circles, the Conservation Support Areas comprise less than 15
3 percent of the 3400-acre circle, the “82 percent of the total conservation” figure touted
4 earlier by the Services inure to the benefit of Fruit Growers. AR 40139. This is so even
5 though 27 percent of that 82 percent total conservation value figure does not involve owl
6 circles with Fruit Growers-established Conservation Support Areas; rather they comprise
7 the 15 owl circles where take is not even likely to occur. AR 36200.

8 Significantly, the conservation value calculations themselves do not factor in Fruit
9 Growers’ specific mitigation efforts—its development of the Conservation Support Areas.
10 Instead, the formula for the conservation value relies on four other factors. Admittedly,
11 one of these factors includes examining the proportion of private land within the owl
12 circle. AR 36193. None of these factors, however, involve a consideration of what
13 impact, if any, Fruit Growers’ Conservation Support Areas would have on the final
14 conservation value.

15 In other words, the record leaves open the possibility that the conservation values
16 for the highest value owl circles are what they are regardless of whether Conservation
17 Support Areas are ever created in those circles by Fruit Growers. AR 36193.

18 Contrary to what the Services claimed at oral argument, the Court finds it arbitrary
19 and capricious to conclude: “what is being analyzed and credited . . . is what Fruit Growers
20 is doing on its own land.” *See* Dkt. No. 76, Tr. at 11/19/14, 2:44-2:49. In finding that “82
21 percent of the total conservation of all [owl circles] . . . would be retained and conserved
22 under the [Plan],” AR 40139, FWS assumes that it is Fruit Growers’ *actions* that would
23 provide the beneficial conditions to the owls, which then generates high conservation
24 values. This is an arbitrary and capricious assumption.

25 FWS’s weighing of owl-circle conservation values relied on the conservation efforts
26 of entities other than applicant Fruit Growers, namely the Forest Service. It is the Forest
27 Service that owns the overwhelming majority of acreage within the 3400-acre owl circles.
28 Because the Forest Service is not an incidental-take-permit “applicant,” FWS erred when it

1 failed to rely solely on Fruit Growers’ minimization and mitigation efforts. *See Sierra*
2 *Club v. Babbitt*, 15 F. Supp. 2d 1274, 1282 (S.D. Ala. 1998) (“FWS cannot comply with
3 the strict ESA mandate that the HCP ‘minimize and mitigate’ the effects of the projects ‘to
4 the maximum extent practicable’ simply by relying on speculative future actions by [non-
5 applicant] others.”).

6 Additionally, the Services’ own guidance, the HCP Handbook at 7-3, states that the
7 Services may only consider habitat conservation measures that are provided by the
8 incidental-take-permit applicant. In those instances where an HCP covers activities
9 implicating multiple landowners, the permit holder must “have specific authority over the
10 other parties affected by the HCP and be willing to exercise that authority, or must secure
11 commitments from them that the terms of the HCP will be upheld.” HCP Handbook at 7-5
12 to 7-6. Here, Fruit Growers possesses no such “specific authority” over the U.S. Forest
13 Service or any other landowner to guarantee that those non-applicants will uphold the
14 terms of the Plan.

15 In the final analysis, an agency decision is “arbitrary and capricious if the agency
16 has relied on factors which Congress has not intended it to consider.” *Motor Vehicles*, 463
17 U.S. at 43. By relying on the minimization and mitigation efforts by the U.S. Forest
18 Service, an entity other than the applicant Fruit Growers, FWS improperly found that Fruit
19 Growers satisfied the “minimize and mitigate” requirement in ESA § 10(a)(2)(B)(ii).

20 Consequently, the decision to issue the incidental take permit was arbitrary and
21 capricious. Applicant landowners seeking to perform actions that would lead to a taking of
22 an endangered or threatened species should not be permitted to obtain incidental take
23 permits by piggybacking off of already-existing conservation efforts by their non-applicant
24 neighbors.

25 Were the Court to affirm FWS’s “minimize and mitigate” finding, Fruit Growers
26 would be permitted to log more than 36,000 acres of suitable northern spotted owl habitat,
27 and take 83 northern spotted owls, while only preserving and protecting 7,100 acres. AR
28 36191, 36202-04, 36255. The Court finds that FWS failed to “articulate a rational

connection” between these facts and its § 10(a)(2)(B)(ii) finding. *See Or. Natural Res. Council*, 109 F.3d at 526.

ii. Fruit Growers’ Unenforceable Commitments

In their § 10 findings, the Services identified five proposed mitigation measures for the owl taking, the first of which involves the creation of Conservation Support Areas. Another mitigation measure involves increasing the northern spotted owl’s dispersal habitat. According to the Services’ findings: “The changes in timber management practices identified in the proposed [the Plan] are expected to result in an increase in northern spotted owl foraging and dispersal habitat across [Fruit Growers] ownership over the permit term due to a decrease in clearcutting and other even-aged management practices.” AR 40140. The presence of adequate dispersal habitat is essential for the northern spotted owl’s population growth as it can provide protection from predators and minimal foraging opportunities. *See* 77 Fed. Reg. at 71884-85; AR 34093 (“Dispersal habitat is essential to the dispersal of juvenile, non-territorial, or displaced northern spotted owls”).

KS Wild argues that the Services’ § 10 “minimize and mitigate” finding is arbitrary and capricious because Fruit Growers’ promise to increase dispersal habitat through a decrease in clearcutting is unenforceable. KS Wild contends that the Plan does not actually obligate Fruit Growers to reduce clearcutting or increase dispersal habitat. Dkt. No. 53 at 41-42. The Plan also does not set forth objective criteria by which to measure compliance; instead, the Plan only states that Fruit Growers will merely “promote” practices that develop and maintain dispersal habitat. *Id.*

While the Services concede that the Plan does not explicitly require Fruit Growers to reduce clearcutting as part of its mitigation efforts, the Services point out that “the Plan does expressly require [Fruit Growers] to ‘promote forest management practices that *develop and maintain dispersal habitat across its ownership* to provide connectivity between the [Conservation Support Areas] and nearby federal lands.” Dkt. No. 63 at 26 (quoting AR 36139) (emphasis added by Services). The Services further explain that a

1 decrease in clearcutting is “an expected outcome of [the] Plan due in part to the
2 enforceable obligation of [Fruit Growers] to *implement* forest management practices that
3 ‘develop and maintain dispersal habitat across its ownership.’” *Id.* (emphasis added).

4 Contrary to what the Services contend in their summary judgment cross-motion, the
5 Plan does not require Fruit Growers to “implement” practices that develop and maintain
6 dispersal habitat. Rather, the Plan only states that Fruit Growers will “promote” such
7 practices. AR 36139. Despite any good faith effort on the part of Fruit Growers to
8 promote or encourage certain forest practices, the Court agrees with KS Wild that the Plan
9 lacks specific obligations to reduce clearcutting.

10 Moreover, the Plan is bereft of any objective criteria to give it the teeth needed to
11 ensure, through enforcement by the Services or the public, that Fruit Growers’ practices
12 will lead to an actual increase in dispersal habitat. *See Southwest Ctr. for Biological*
13 *Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1140 (S.D. Cal. 2006) (enjoining incidental take
14 permit after finding applicant’s duty to “avoid” vernal pool habitat “toothless” because the
15 “avoidance standard allows the City or developer to unilaterally determine that a particular
16 development project cannot avoid the vernal pools”). Indeed, there is a difference between
17 “promoting” or expecting the development and maintenance of dispersal habitat, and
18 actually developing and maintaining dispersal habitat.

19 Finally, the Plan itself, in a section of the appendix entitled “Monitoring Protocols,”
20 expressly states: “Because [Fruit Growers] will maintain a forested landscape on their
21 ownership, the biological objective for dispersal habitat will be met. *No compliance*
22 *monitoring or additional reporting is required to document compliance with this*
23 *measure.*” AR 36449 (emphasis added). As for that statement’s conclusory first sentence,
24 the Services in their Final Environmental Impact Statement went on to admit that the
25 statement that “almost any forested landscape can provide dispersal opportunities” is “an
26 oversimplified, if not incorrect, characterization of dispersal habitat.” AR 38942
27 (responding to public comment from KS Wild regarding Draft Environmental Impact
28 Statement).

The fact remains that ESA § 10(a)(2)(B)(ii) requires the Secretary to find that “the applicant *will* . . . minimize and mitigate the impacts” of a taking. ESA § 10(a)(2)(B)(ii), 16 U.S.C. § 1539(a)(2)(B)(ii) (emphasis added). The Secretary cannot make this ESA § 10(a)(2)(B)(ii) finding by relying on mitigation that the Services cannot enforce. Here, without concrete, objective criteria to enforce Fruit Growers’ commitments to increase dispersal habitat, the Court finds the Services’ conclusion that “the applicant will” in fact mitigate the taking of owls by reducing clearcutting to be arbitrary and capricious.

b. Biological Opinion

In addition to the Secretary’s responsibility to review incidental-take-permit applications under ESA § 10, the Secretary must insure that issuance of a permit complies with ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Under § 7, a federal agency must “insure that any action authorized, funded, or carried out by such agency . . . is *not likely to jeopardize* the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species” ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (emphasis added). In considering whether to issue an incidental take permit, the Service—in this case FWS—must prepare a “biological opinion” addressing whether jeopardy is likely to occur for any protected species. *Ctr. for Biological Diversity v. U.S. BLM*, 698 F.3d 1101, 1107 (9th Cir. 2012) (citing 50 C.F.R. § 402.14). An action will result in “jeopardy” if it will “reduce appreciably the likelihood of both the survival and recovery of a listed species” 50 C.F.R. § 402.02. In this regard, the “no jeopardy finding required by ESA § 7(a)(2) is identical to the survival finding required under § 10(a)(2)(B)(iv).” *Nat’l Wildlife Fed’n v. Babbitt*, 128 F. Supp. 2d 1274, 1286 (E.D. Cal. 2000) (quoting §10(a)(2)(B)(iv), which requires the Secretary to find “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild”).

If FWS concludes that jeopardy or adverse modification is likely, then any take resulting from the proposed action is subject to ESA § 9 liability. *Ctr. for Biological Diversity*, 698 F.3d at 1107 (citations omitted) (noting that while an applicant can

1 technically disregard the biological opinion, “it does so at its own peril”). On the other
 2 hand, if FWS “concludes in its biological opinion that no jeopardy or adverse modification
 3 is likely, but that the project is likely to result only in the ‘incidental take’ of members of
 4 listed species, then the FWS will provide, along with its biological opinion, an incidental
 5 take statement authorizing such takings.” *Id.* (citing 50 C.F.R. § 402.14(i)). This
 6 incidental take statement “functions as a safe harbor provision immunizing persons from
 7 Section 9 liability and penalties for takings committed during activities that are otherwise
 8 lawful and in compliance with its terms and conditions.” *Id.* (internal quotation marks and
 9 citations omitted).

10 Here, KS Wild challenges the validity of FWS’s biological opinion. KS Wild
 11 argues first that FWS’s reliance on Fruit Growers’ “unenforceable promise to reduce
 12 clearcutting” renders its ‘no jeopardy’ findings under the biological opinion arbitrary and
 13 capricious. Dkt. No. 53 at 43. And secondly, that these “no jeopardy” findings are
 14 arbitrary and capricious because FWS relied on the incorrect assumption that the forests
 15 surrounding Fruit Growers land will remain unchanged during the incidental take permit’s
 16 50-year term. *Id.* at 46.

17 **i. FWS’s “No Jeopardy” Findings**

18 Under Ninth Circuit law, a wildlife agency may rely on mitigation or conservation
 19 measures in issuing a “no jeopardy” biological opinion. Such measures, however, must
 20 involve “specific and binding plans” as well as “a clear, definite commitment of resources
 21 for future improvements.” *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 935-36 (9th Cir.
 22 2008) (finding agency’s “sincere general commitment to future improvements” inadequate
 23 to support no-jeopardy conclusion). What is more, mitigation measures supporting a
 24 biological opinion’s no-jeopardy conclusion must be “reasonably specific, certain to occur,
 25 and capable of implementation; they must be subject to deadlines or otherwise-enforceable
 26 obligations; and most important, they must address the threats to the species in a way that
 27 satisfies the jeopardy and adverse modification standards.” *Ctr. for Biological Diversity v.*
 28 *Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing *Sierra Club v. Marsh*, 816

1 F.2d 1376 (9th Cir. 1987)).

2 Here, FWS issued a biological opinion concluding that implementation of the Plan
3 “is not likely to jeopardize the continued existence of the northern spotted owl or impede
4 its recovery, and will not destroy or adversely modify designated critical habitat.” AR
5 34258. The biological opinion then summarized the various bases for its determination
6 under four categories: (1) the relative impacts to populations (within the “Action Area,” on
7 a regional scale, on a provincial scale, and rangewide); (2) the relative impact of habitat
8 modification; (3) the role of conservation planning and mitigation; and (4) impacts to the
9 northern spotted owl critical habitat. AR 34258-34261.

10 KS Wild argues that FWS’s no-jeopardy finding relies on a mitigation measure that
11 fails to meet the Ninth Circuit’s standards. Specifically, KS Wild contends that Fruit
12 Growers’ promise to mitigate the taking by reducing clearcutting lacks specific and
13 binding plans, and does not lead to an increase in dispersal and foraging habitat. To
14 support its position, KS Wild cites primarily to *Nat’l Wildlife Federation v. NMFS*, which
15 involved a biological opinion in which NMFS relied on an action agency’s intention to
16 mitigate impacts from building a dam by installing fish passage structures “where
17 feasible.” 524 F.3d at 936. The Ninth Circuit invalidated the biological opinion because it
18 was “not persuaded that even a sincere general commitment to future improvements may
19 be included in the proposed action in order to offset its certain immediate negative effects,
20 absent specific and binding plans.” *Id.*

21 Here, the Court already ruled it was arbitrary and capricious to conclude that Fruit
22 Growers’ promise to reduce clearcutting constitutes enforceable mitigation, and agrees
23 with KS Wild that Fruit Growers failed to present “specific and binding plans” as to this
24 particular mitigation measure.

25 But the Court finds *National Wildlife* distinguishable because of a difference in the
26 degree to which the Service’s biological opinion in that case relied on the applicant’s
27 mitigation measure. There, the Ninth Circuit found that NMFS had “relied *significantly* on
28 [the] future [mitigation measures]” at issue. *Id.* (emphasis added). Other courts have

1 refused to invalidate biological opinions when the allegedly defective mitigation measures
2 cited by plaintiffs do not constitute the *primary* reason behind a wildlife service’s no-
3 jeopardy finding. *See, e.g., Grand Canyon Trust v. U.S. Bureau of Reclamation*, 2010 WL
4 2643537, at *21 (D. Ariz. June 29, 2010) (rejecting argument to invalidate biological
5 opinion where alleged unenforceable mitigation measure did not constitute the “primary
6 reason” for the no jeopardy or adverse modification); *cf. Rumsfeld*, 198 F. Supp. 2d at
7 1152 (finding biological opinion arbitrary and capricious where consulting agency’s no-
8 jeopardy finding was “*based entirely* on the successful and prompt implementation of the
9 [deficient mitigation measure]”) (emphasis added); *see also id.* (mitigation measures “were
10 critical to the ‘no jeopardy’ finding”).

11 In contrast, FWS in this case relied on several factors to reach its no-jeopardy
12 finding. For instance, FWS looked at the expected percentage reduction in nesting and
13 roosting habitat within various regions, the impact of the taking on the overall conservation
14 value of the area, and the finding that no critical habitat will be directly impacted or
15 adversely modified. AR 34258-34261. FWS also considered how much it expected Fruit
16 Growers’ actions would reduce the owl population. AR 34259.

17 To be sure, in the conclusion section listing the bases for its no-jeopardy
18 determination, the biological opinion does discuss the expected increase in foraging habitat
19 across Fruit Growers land. AR 34260. Elsewhere, the biological opinion also does
20 recognize that “[a]n important aspect of the [Plan] is the ownership-wide increase in
21 foraging and dispersal habitat that is predicted to occur due to changes in [Fruit Growers’]
22 management practices.” AR 34241.

23 But after examining the entirety of the biological opinion, the Court does not find
24 that this mitigation measure constituted a critical, primary, or relatively significant factor
25 in FWS’s finding that the Plan is “not likely to jeopardize the continued existence of the
26 northern spotted owl or impede its recovery.” So on the one hand, KS Wild claims that
27 “FWS expressly and repeatedly relies on expected increases in . . . dispersal habitat” to
28 make its no-jeopardy finding. Dkt. No. 53 at 44. On the other hand, however, neither the

word “clearcutting” nor the term “dispersal habitat” appear in subsection “6.1 Northern Spotted Owl” of the “Conclusion” section as an identified factor that served as a basis for the no-jeopardy determination. AR 34258-61.

Accordingly, the Court does not find the no-jeopardy conclusions made in FWS’s biological opinion to be arbitrary and capricious.

ii. FWS’s Inconsistent Assumptions

KS Wild argues that FWS’s “no jeopardy” findings are also arbitrary and capricious because “FWS assumed that northern spotted owl habitat outside of Fruit Growers land would persist unchanged for the entire 50-year term even though FWS’s own [biological opinion] predicts significant declines in spotted owl habitat on surrounding Forest Service lands due to logging, fire, disease, and competition from barred owls.” Dkt. No. 53 at 47. In other words, because the biological opinion’s no-jeopardy conclusion rests on “internally inconsistent assumptions,” this Court should invalidate and vacate the biological opinion. *Id.* at 13, 47. To support this position, KS Wild relies on *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010), which KS Wild characterizes as having found a biological opinion invalid because of its reliance on “conflicting findings to reach its conclusion” Dkt. No. 53 at 49.

KS Wild’s reliance on *Wild Fish* for that proposition is misplaced. There, the agency knew that a private fish hatchery’s operation caused the decline in the bull trout population. In fact, the consulting agency already determined that the hatchery’s continued operation would likely “at least reduce, and in some years preclude,” migratory bull trout spawning and that the local bull trout population would continue to decline. *Wild Fish*, 628 F.3d at 527. Yet the agency concluded that the hatchery’s operation would not reduce appreciably the likelihood of both the survival and recovery of the population, without reconciling the fact that the necessary spawning is likely to be precluded in some years. *Id.*

Consequently, the Ninth Circuit invalidated the no-jeopardy finding. The court held that the facts the agency determined did not support its obvious contradictory conclusion

1 that operational changes at the hatchery would improve the contribution of a local
2 population of threatened bull trout to the survival of the species. *Id.* at 520, 528.

3 According to the court, “the bottom line of the Service’s findings is that as a result of the
4 [challenged] action, the local bull trout population will continue to decline.” *Id.* at 528.

5 To summarize, the infirmity in *Wild Fish* involved a contradiction between an
6 agency’s findings in its biological opinion and its ultimate conclusion. It did not involve a
7 contradiction between assumptions in its findings. *See* Dkt. No. 53 at 47 (describing
8 “internally inconsistent assumptions”).

9 Moreover, portions of the biological opinion here suggest that FWS did consider
10 changes in habitat conditions. For instance, as KS Wild itself concedes, FWS’s biological
11 opinion noted: “[t]hreats to the northern spotted owl in this region included habitat loss due
12 to fires, Federal and private management activities, displacement by barred owls, forest
13 health (insect outbreaks and disease), and potential for avian disease.” AR 34194.

14 Accordingly, because KS Wild cites to no authority for the proposition that an
15 agency’s “reli[ance] on conflicting findings” renders a biological opinion arbitrary and
16 capricious, the Court will not invalidate FWS’s biological opinion on this basis.

17 **2. Coho Salmon**

18 KS Wild offers two main arguments about why this Court should invalidate the
19 incidental take permit issued by the National Marine Fisheries Service. First, KS Wild
20 asserts that the biological opinion itself should be invalidated because NMFS’s no-
21 jeopardy finding failed to evaluate the Plan’s short-term impacts on coho salmon. Second,
22 KS Wild argues that NMFS erred by finding that the Plan met the requirements under ESA
23 § 10. In addition to failing to meet the no-jeopardy requirement, ESA § 10(a)(2)(B)(iv), 16
24 U.S.C. § 1539(a)(2)(B)(iv), KS Wild contends that the Plan improperly relied on
25 unenforceable mitigation efforts and did not adequately analyze whether the Plan
26 minimizes and mitigates the impacts “to the maximum extent practicable,” ESA §
27 10(a)(2)(B)(ii), 16 U.S.C. § 1539(a)(2)(B)(ii).

28 //

a. Incidental Take Permit and Biological Opinion

i. NMFS's Failure to Evaluate Short-Term Impacts

In three ESA cases involving salmon, the Ninth Circuit stressed that NMFS “must consider near-term habitat loss to populations with short life cycles,” including populations with only a three-year life cycle. *Pac. Coast Fed’n v. BOR*, 426 F.3d 1082, 1094 (9th Cir. 2005) (rejecting agency’s no-jeopardy conclusion for failure to provide adequate analysis of short-term impacts on endangered coho salmon) (citing *Pac. Coast Fed’n v. NMFS*, 265 F.3d 1028, 1037-38 (9th Cir. 2001)); *see also Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 934-35 (9th Cir. 2008) (finding biological opinion “did not adequately demonstrate that [the impacts of the planned mitigation] would not affect the fishes’ survival and recovery, in light of their short life-cycles and current extremely poor habitat conditions”).

In those cases, the Ninth Circuit faulted the agency for only considering the impact of the planned actions for periods of 10 years or more. *See Pac. Coast Fed’n v. NMFS*, 265 F.3d at 1037-38 (analyzed impact over a 10-year period); *Pac. Coast Fed’n v. BOR*, 426 F.3d at 1094 (analyzed impact over eight to 10 years); *Nat’l Wildlife Fed’n*, 524 F.3d at 934 (finding analysis of six-year period insufficient). Indeed, “[g]iven the importance of the near-term period on listed species survival it is difficult to justify NMFS’s choice not to assess degradation over a time frame that takes into account the actual behavior of the species in danger.” *Pac. Coast Fed’n v. BOR*, 426 F.3d at 1094 (quoting *Pac. Coast Fed’n v. NMFS* 265 F.3d at 1038).

Here, NMFS failed to analyze the short-term impacts of Fruit Growers’ plan to harvest timber on nearby threatened coho salmon, even though NMFS’s biological opinion recognized that coho salmon have only a three-year life cycle. AR 37658 (“Adult coho salmon reach sexual maturity at 3 years, and die after spawning.”). In reaching its no-jeopardy finding, NMFS relied on broad references to certain impacts to coho salmon habitat expected to occur “[o]ver the course of the 50-year permit term” AR 37783; *see, e.g.*, AR 37779 (“NMFS anticipates that over the 50-year duration of the proposed action . . . there will be management-related occurrences that result in adverse effects to

covered species and their habitats.”); AR 37783 (“NMFS anticipates a limited extent of habitat supporting covered species could be harmed over the 50-year duration of the permit and such harm would occur stochastically without any predictability.”); *see also* AR 37745 (“Impacts to salmonids or designated critical habitat could occur during the period between permit issuance and treatment if road sites fail and deliver sediment However, we believe sediment delivery will occur at lower rates and quantities within the first 15 years than would be expected without implementation of the HCP.”). This contravenes Ninth Circuit law.

Nonetheless, the Services attempt to distinguish those cases, which limited their analysis to a particular time, and argue “NMFS has not limited its analysis to any particular timeframe, but rather, has analyzed both short- and long-term impacts from the undertaking of activities, whenever those activities occur during the permit term.” Dkt. No. 63 at 38. Even so, this decision to not limit the time frame still “disregard[s] [the Ninth Circuit’s] clear instruction” to consider impacts to habitat loss in an applied, time-specific manner that reflects the life cycle of the endangered or threatened species. *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d at 934 (citing *Pac. Coast Fed’n v. BOR*, 426 F.3d at 1094).

The Services also attempt to distinguish the analysis in its biological opinion from *Pacific Coast Federation of Fishermen’s Associations v. NMFS*, 265 F.3d at 1037, where “the agency evaluated distinct planned timber sales on federal land.” Dkt. No. 63 at 38. In contrast, here, the Services stress that the “exact location of future timber harvests on [Fruit Growers’] lands is not yet known” and suggest they would have to speculate. *Id.* This may be so. But the fact remains that ESA § 7 “imposes a substantive duty on [federal agencies] to ensure that its actions are not likely to jeopardize the continued existence of the listed fish or result in destruction or adverse modification of critical habitat.” *Ctr. for Biological*, 698 F.3d at 1127 (citing ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2)). If NMFS does not have the information to satisfy this duty, then it simply cannot issue a finding of no jeopardy.

1 In any case, because NMFS concluded that long-term benefits would outweigh any
2 short-term impacts of logging, without actually adequately analyzing those short-term
3 impacts, the Court finds that NMFS's no-jeopardy conclusion was arbitrary and capricious.
4 Accordingly, the Court invalidates NMFS's biological opinion as well as the
5 accompanying incidental take statement.

6 The Services do seek summary judgment on this incidental take statement's
7 validity. In its complaint, KS Wild's sixth claim alleges that NMFS violated ESA § 7
8 when it failed to prepare a legally sufficient incidental take statement. Dkt. No. 1 at ¶¶
9 139-142. The Services argue that KS Wild waived this claim by failing to pursue it at
10 summary judgment. Dkt. No. 63 at 50. But because an invalid biological opinion
11 necessarily invalidates the accompanying incidental take statement, the Court will deny the
12 Services' motion as to the validity of NMFS's incidental take statement. *See Or. Natural*
13 *Res. Council v. Allen*, 476 F.3d 1031, 1036-37 (9th Cir. 2007) ("Without the 'no jeopardy'
14 determination contained in the underlying [biological opinion], the Incidental Take
15 Statement potentially pre-authorizes take for an action that could subsequently be
16 determined to jeopardize the existence of an endangered species.").

17 Likewise, because the no-jeopardy finding required by ESA § 7(a)(2) is identical to
18 the survival finding required under § 10(a)(2)(B)(iv), *Babbitt*, 128 F. Supp. 2d at 1286, the
19 Court also finds that NMFS's issuance of the incidental take permit was arbitrary and
20 capricious.

21 **ii. NMFS's "Minimize and Mitigate" Finding**

22 KS Wild also argues that NMFS's no-jeopardy and § 10(a)(2)(B)(ii) findings as to
23 the coho salmon are arbitrary and capricious for another reason: NMFS relied on numerous
24 voluntary and unenforceable provisions in the Plan intended to serve as mitigation for the
25 take. Dkt. No. 53 at 51. For instance, KS Wild argues NMFS relied on aspirational and
26 unenforceable assurances that Fruit Growers' "road management plan will result in the
27 gradual reduction of native road mileage across the plan area." AR 37744. In response,
28 the Services contend the Plan does include, among other measures, a detailed road

1 management plan and slope protection measures, both of which will reduce and prevent
2 sedimentation. Dkt. No. 63 at 29. As stated earlier, sedimentation can adversely affect
3 coho salmon.

4 The Court declines to take up this issue of mitigation enforceability at this time
5 because, as a threshold matter, it finds NMFS arbitrary and capriciously concluded that
6 Fruit Growers satisfied the “minimize and mitigate” requirement under § 10. In fact, in
7 reaching this conclusion in its § 10 finding, NMFS explicitly relied upon the biological
8 opinion’s findings. But just as such findings failed to consider the short-term impacts of
9 the Plan, NMFS in its § 10 finding also failed to consider the short-term impacts on coho
10 salmon when determining whether Fruit Growers’ proposed conservation measures would
11 mitigate the taking.

12 Indeed, NMFS states in the “minimize and mitigate” section of its § 10 finding:

13
14 NMFS concludes in the Biological Opinion that although [Fruit
15 Growers’] continued timber management activities are likely to
16 result in continued anthropogenic contributions of sediment to
17 streams that support covered species, *over the duration of the*
18 *50-year permit*, improvements to habitat will occur as the level
19 of sediment input to fish-bearing streams declines due to the
20 HCP’s sediment reduction strategies.

21 NMFS AR 150905 (emphasis added). NMFS goes on to state that “the Biological Opinion
22 concludes that as the conservation measures of the HCP are implemented *over time*,
23 riparian stands along fish-bearing watercourses are likely to improve in their long term
24 functionality for providing salmonid habitat” NMFS AR 150905 (emphasis added).
25 From this, the § 10 finding concludes that Fruit Growers “has minimized and mitigated the
26 impacts of authorized take to the maximum extent practicable.” NMFS AR 150906.

27 To be sure, the Plan does include efforts to implement road management measures
28 to prevent and control erosion production and sediment delivery to streams. AR 36126-27.
For instance, under one part of the Plan to minimize and mitigate the taking, Fruit Growers
describes its “objective [to] reduce road-related erosion delivery potential by 50 percent in
the first 10 years of the Permits.” AR 36100; *see also* AR 36127 (“All drainage level road

erosion inventories will be completed within 10 years of issuance of the Incidental Take Permits, with the top five priority drainages [out of 20] . . . completed in the first 5 years.”).

But without considering the three-year life cycle of the coho salmon—and by relying on a biological opinion that only considered the long-term impacts—NMFS arbitrarily and capriciously made its “minimize and mitigate” finding. NMFS’s § 10 finding states that the benefits of Fruit Growers’ mitigation efforts—in the form of improvements to habitat—will occur “over the duration of the 50-year permit.” NMFS AR 150906. In other words, the amount of time it would take for the benefits of Fruit Growers’ “sediment reduction strategies” to have a positive impact on coho salmon may far exceed the coho salmon’s life-span. *See Pac. Coast Fed’n v. BOR*, 426 F.3d at 1094 (finding that without an analysis of short-term impacts, the 10-year project at completion, under one scenario, “will not protect the coho, for there will be none to protect”).

Accordingly, because NMFS’s “minimize and mitigate” finding was arbitrary and capricious, the Court will not reach the question of whether Fruit Growers’ proposed mitigation measures are enforceable.

For this same reason, the Court will neither decide the question of whether the biological opinion improperly relied upon unenforceable mitigation measures, nor will it decide whether the Plan minimizes and mitigates the impacts “to the maximum extent practicable” under ESA § 10(a)(2)(B)(ii).

B. National Environmental Policy Act

In addition to its claims under the ESA, KS Wild alleges that the Services also violated the National Environmental Policy Act. Under this statute, agencies considering “major Federal actions significantly affecting the quality of the human environment” must prepare and issue an environmental impact statement. 42 U.S.C. § 4332(2)(C); *Nw. Env’tl. Advocates v. NMFS*, 460 F.3d 1125, 1133 (9th Cir. 2006). The statement “shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or

1 minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R.
 2 § 1502.1; *Nw. Env'tl. Advocates*, 460 F.3d at 1134. Thus, the environmental impact
 3 statement is more than a mere “disclosure document.” 40 C.F.R. § 1502.1. The Court’s
 4 job in reviewing an environmental impact statement “is to ensure that the agency has taken
 5 a ‘hard look’ at the potential environmental consequences of the proposed action.”
 6 *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) (citing
 7 *Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001)). By focusing on the
 8 environmental effects of the proposed agency action, “NEPA ensures that the agency will
 9 not act on incomplete information, only to regret its decision after it is too late to correct.”
 10 *Marsh*, 490 U.S. at 371 (1989).

11 In reviewing the proposed action, NEPA requires an agency to consider the
 12 proposed action’s impact in the context of all relevant circumstances, such that where
 13 “several actions have a cumulative . . . environmental effect, this consequence must be
 14 considered in an [environmental impact statement].” *Neighbors of Cuddy Mountain v.*
 15 *U.S. Forest Serv.*, 137 F.3d 1372, 1378 (9th Cir. 1998) (quoting *City of Tenakee Springs v.*
 16 *Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990)). A cumulative effect is “the impact on the
 17 environment which results from the incremental impact of the action when added to other
 18 *past, present, and reasonably foreseeable future actions* regardless of what agency
 19 (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7
 20 (emphasis added).

21 Therefore, an environmental impact statement “must analyze the combined effects
 22 of the actions in sufficient detail to be ‘useful to the decisionmaker in deciding whether, or
 23 how, to alter the program to lessen cumulative impacts.’” *Muckleshoot Indian Tribe v. U.S.*
 24 *Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999) (citation omitted). “General statements
 25 about ‘possible effects’ and ‘some risk’ do not constitute a ‘hard look’ absent a
 26 justification regarding why more definitive information could not be provided.” *Te-Moak*
 27 *Tribe of W. Shoshone of Nev. v. U.S. Dept. of the Interior*, 608 F.3d 592, 603 (9th Cir.
 28 2010) (citation omitted).

1 **1. Cumulative Effects Analysis in Environmental Impact Statement**

2 **a. Timber Harvests**

3 KS Wild first asserts that the Services' Final Environmental Impact Statement
4 section on cumulative effects lacks "any analysis [] on the cumulative impacts of the
5 timber harvest proposed by [the Plan] and timber harvest on proximate federal and
6 nonfederal lands." Dkt. No. 53 at 59. The Court agrees. The section only generally
7 describes the history of timber operations within the area affected by the Plan. *See* AR
8 38609 (describing how logging operations in the early 1900s used "'steam donkeys'"
9 (steam-powered hoists), log chutes, horses, and oxen to transport logs."). "But there is no
10 catalog of past projects and no discussion of how those projects (and differences between
11 the projects) have harmed the environment." *Lands Council*, 395 F.3d at 1027; *see also*
12 *Muckleshoot*, 177 F.3d at 809-10 (environmental impact statement "must catalog[]
13 adequately the relevant past projects in the area") (internal citation and quotation marks
14 omitted)). In fact, according to the Final Environmental Impact Statement:

15 Timber harvest operations and fire suppression activities
16 continue to occur today and will continue into the future.
17 Timber harvest occurs in the Plan Area and on adjacent lands,
both public and private. These activities are regulated by plans
and policies as described below.

18 AR 38610.

19 While the Statement goes on to describe various state and federal regulatory
20 regimes that govern timber projects, AR 38610-12, it fails to discuss what the timber
21 harvest operations are that have taken place and "continue to occur today[.]" AR 38610.
22 These omissions do not satisfy NEPA. *See Lands Council*, 395 F.3d at 1028 ("[T]he
23 general rule under NEPA is that, in assessing cumulative effects, the Environmental
24 Impact Statement must give a sufficiently detailed catalog[] of past, present, and future
25 projects, and provide adequate analysis about how these projects, and differences between
26 the projects, are thought to have impacted the environment.") (citations omitted). The
27 need to inform "decisionmakers and the public" about the Plan's cumulative effects is
28

1 especially crucial in this case, where the Services, in weighing Fruit Growers' mitigation
2 efforts, relied upon the conservation value of entire owl circles, the bulk of which are made
3 up of vast acres of land that does not belong to Fruit Growers.

4 For the public and Services personnel to adequately evaluate the cumulative effects
5 of the timber harvests, the Final Environment Impact Statement should have provided
6 "adequate data about the time, type, place, and scale of [past, present, and to the extent
7 known, future] timber harvests and should have explained in sufficient detail how different
8 project plans and harvest methods affected the environment. The [] Service[s] did not do
9 this, and NEPA requires otherwise." *See id.* (citing *Muckleshoot*, 177 F.3d at 809-10).

10 **b. Herbicides**

11 KS Wild also argues that the Final Environmental Impact Statement fails to analyze
12 the cumulative effects of herbicide use on coho salmon in areas affected by the Plan. The
13 Services, however, contend that they had no obligation to analyze use of these materials
14 because Fruit Growers never requested herbicide and chemical use be covered under the
15 incidental take permits. Dkt. 63 at 48; *see* NMFS AR 150901 (stating in § 10 findings that
16 "[a]ctivities not covered by the [incidental take permit] include herbicide and insecticide
17 applications").

18 Nonetheless, the Services do concede that while NMFS did not evaluate forest
19 chemical use in the Final Environmental Impact Statement, it did evaluate chemical use as
20 an "interrelated and interdependent effect of the proposed action" in its biological opinion.
21 *Id.* (citing AR 38923). The Services also stated in their Final Environmental Impact
22 Statement that the "applicant [Fruit Growers] periodically applies herbicides that are
23 approved for forestry use" by the California Department of Pesticide Regulation and the
24 Environmental Protection Agency. AR 38389. The regulations define cumulative effect
25 as "the impact on the environment which results from the incremental impact of the
26 action." 40 C.F.R. § 1508.7.

27 Here, while "the action" consists generally of Fruit Growers' timber harvesting,
28 NMFS itself found herbicide application—to control vegetation and damaging insects—

1 not only “reasonably foreseeable,” but also “interrelated and interdependent with the
2 [Plan].” AR 37753. In fact, NMFS’s biological opinion went on to identify over a dozen
3 chemicals, their various applications, the ingredients involved, and their effects. AR
4 37753-62. In light of these considerations, the Court does not see why the decision over
5 whether to analyze the cumulative impact of herbicide use in the Final Environmental
6 Impact Statement hinges on whether or not Fruit Growers requested “coverage” under the
7 permit to use those chemicals.

8 Thus, the Court finds that the Services erred when they failed to analyze the
9 cumulative effects of herbicide use—which the Services themselves admit to be
10 “interrelated and interdependent” with the Plan—in the Final Environmental Impact
11 Statement.

12 c. Water Withdrawal

13 Finally, KS Wild contends that the Services failed to discuss the cumulative effects
14 of water withdrawals on coho salmon, and on lands affected by the Plan, including nearby
15 federal and nonfederal lands. Dkt. No. 53 at 61. KS Wild points out that on the one hand,
16 the Services state that the “amount and timing” of water drafting is “unquantified,” AR
17 38504, and provide no information as to the proposed use of the withdrawals, the amount
18 of withdrawal, the season of withdrawal, or other related characteristics. *See* AR 38626.

19 On the other hand, the Final Environmental Impact Statement includes a series of
20 maps displaying the proposed “water drafting sites” within three regions of Fruit Growers
21 lands subject to the Plan. AR 38449, 38451, and 38453. And shortly after it stated that the
22 amount and timing of water withdrawals from certain stream channels for silvicultural
23 operations or fire suppression purposes are “unquantified,” the Services stated that the
24 “applicant does not divert substantial quantities of water from streams in the Plan Area.”
25 Instead, the applicant typically “conducts water drafting from Class II streams with
26 [greater flows] . . . or more commonly, from off-channel water holes.” AR 38504.

27 The Services respond by arguing that Fruit Growers’ water withdrawals over the
28 permit term “cannot be known with certainty because the timing and quantity of such

1 withdrawals depends on where timber and road usage is occurring, which is highly
2 variable.” Dkt. No. 63 at 49 (citing AR 35943). Put differently, “[s]uch information need
3 not be analyzed under NEPA because it is speculative.” *Id.* (citing *Envtl. Prot. Info. Ctr. v.*
4 *U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)).

5 The Court disagrees with the Services’ response as to future actions involving water
6 withdrawal. Although “[i]t is not appropriate to defer consideration of cumulative impacts
7 to a future date when meaningful consideration can be given now,” *Kern v. BLM*, 284 F.3d
8 1062, 1075 (9th Cir.2002), nor does the court “require the government to do the
9 impractical,” if not enough information is available to permit meaningful consideration,
10 *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th
11 Cir.1998) (citation omitted).

12 Still, projects that are “reasonably foreseeable” should be included in the
13 cumulative effects analysis. 40 C.F.R. § 1508.7. “NEPA requires that an EIS engage in
14 reasonable forecasting. Because speculation is . . . implicit in NEPA, [] we must reject
15 any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all
16 discussion of future environmental effects as crystal ball inquiry.” *N. Plains Res. Council,*
17 *Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (internal quotation marks
18 and citation omitted).

19 Here, the part of the record the Services cite for the proposition that the “amount
20 and location of [Fruit Growers’] water withdrawals over the next fifty years . . . cannot be
21 known with certainty” simply states that Fruit Growers “may buy, sell, or exchange
22 timberlands” in the area covered by the Plan during the 50-year term. AR 35943. But the
23 Services have already identified the water drafting sites, and provided detailed maps
24 displaying those locations. AR 38449, 38451, 38453. Even if factors change over the long
25 term, with proposed locations already identified, the Court finds it reasonable for Fruit
26 Growers and the Services to be able to identify some parameters of these withdrawals,
27 such as the proposed use of the withdrawals and its effects on nearby lands, even if only in
28 the foreseeable short term.

1 Additionally, the Court finds that the Services are capable of identifying past and
2 current projects that involve water withdrawals as part of its cumulative effects analysis.
3 The Final Environmental Impact Statement makes references to present water-drafting
4 activities. *See, e.g.*, AR 38504 (stating “applicant does not divert substantial quantities of
5 water from streams in the Plan Area” and typically “conducts water drafting from . . . off-
6 channel water holes”); AR 38548 (“Water drafting for road construction and maintenance,
7 as well as for local fire suppression activities, would continue under the No Action
8 Alternative.”). These statements suggest the Services were capable of, but failed to “give a
9 sufficiently detailed catalog[] of past [and] present . . . [water drafting] projects” *See*
10 *Lands Council*, 395 F.3d at 1028.

11 In sum, for the public and Service personnel to adequately evaluate the cumulative
12 effects of past, present, and future water withdrawal activities, the Final Environmental
13 Impact Statement should have provided an adequate analysis about how these projects, and
14 differences between the projects, are thought to impact the environment.” *Id.* Its failure to
15 do so was arbitrary and capricious.

16 **2. Other NEPA Issues**

17 **a. Economic Data**

18 KS Wild raises two other NEPA issues. First, KS Wild asserts that the Services
19 violated NEPA by failing to disclose “relevant economic data” in its Final Environmental
20 Impact Statement. In particular, KS Wild argues that the Services failed to give the public
21 “economic information regarding the applicant [Fruit Growers], its harvest plans, business
22 models, and other information necessary to determine whether the minimal beneficial
23 aspects of [the Plan] will be funded and implemented.” Dkt. No. 53 at 56-57.

24 The Court does not find that the Services violated NEPA by failing to disclose
25 economic data. As an initial matter, KS Wild’s claim is vague—it is not clear if by
26 “economic information,” KS Wild means internal business models, profit-making
27 strategies, or information related to the economic benefits to the wider community (e.g.,
28 jobs). In any case, as the Services emphasize, nothing in NEPA or its regulations require a

1 Final Environmental Impact Statement to disclose or analyze the applicant's economic
2 information.

3 The Court also does not read the cases that KS Wild cites as standing for the
4 proposition that an agency issuing an environmental impact statement must disclose
5 economic information or data about the applicant. *See Seattle Audubon Soc'y v. Lyons*,
6 871 F. Supp. 1291, 1324 (W.D. Wash 1994), *aff'd sub nom. Seattle Audubon Soc'y v.*
7 *Moseley*, 80 F.3d 1401 (9th Cir. 1996) (finding that "where economic analysis forms the
8 basis of choosing among alternatives, that the analysis must not be misleading, biased, or
9 incomplete," not that economic data must be included in an environmental impact
10 statement); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir.
11 2005) (holding that environmental impact statement relying on market demand economic
12 information must not be misleading, not that economic data must be included in an
13 environmental impact statement); *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic*
14 *Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971) (finding NEPA requires that any
15 "economic and technical considerations" considered by a federal agency must be weighed
16 against conflicting "environmental amenities," not that economic data must be included in
17 an environmental impact statement).

18 For these reasons, the Court denies KS Wild's request that the Court find the
19 Services acted arbitrarily and capriciously in failing to disclose certain economic
20 information or data about applicant Fruit Growers in the Final Environmental Impact
21 Statement.

22 **b. Quantification of Environmental Consequences**

23 KS Wild next contends that "the Services violated NEPA in failing to disclose and
24 discuss the quantitative direct, indirect, and cumulative environmental consequences of the
25 proposed action." Dkt. No. 53 at 58. To support the proposition that NEPA requires an
26 agency to quantify its analysis of a proposed action's environmental consequences, KS
27 Wild cites a series of cases, including *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*,
28 137 F.3d 1372 (9th Cir. 1998). There, the Ninth Circuit held that defendant U.S. Forest

1 Service failed to comply with NEPA because its analysis was “very general” and did not
2 discuss in detail the mitigating measures regarding the affected lands. *Neighbors*, 137 F.3d
3 at 1379-80. Notably, the *Neighbors* court stated that “[t]o ‘consider’ cumulative effects,
4 some quantified or detailed information is required.” *Id.* “General statements about
5 ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification
6 regarding why more definitive information could not be provided.” *Id.* at 1380.

7 The Services counter by stating that *Neighbors* does not require the Services to
8 provide quantified information, but only that they provide “either” quantified “or” detailed
9 information for a cumulative-impacts analysis. Dkt. No. 63 at 45. The Services highlight
10 KS Wild’s reliance on *Klamath-Siskiyou*, 387 F.3d at 994-95, which expressly found that
11 “[f]or some of the [environmental] factors, it is understandable why a *qualitative*
12 *description* such as ‘improved’ or ‘degraded’ is suitable.” *Id.* at 994 n.1 (emphasis added).
13 The Services state this case undermines KS Wild’s argument that NEPA requires a
14 quantitative analysis of environmental effects.

15 While the Services quoted the *Klamath-Siskiyou* sentence correctly, they left out the
16 rest of the passage, which distinguished between effects that could and could not be
17 quantified. After stating that qualitative descriptions are suitable at times, the *Klamath-*
18 *Siskiyou* court stated: “For example, the factor ‘Balance of community condition’ is
19 probably not susceptible to easy measurement. Factors such as ‘Amount of suitable and
20 dispersal spotted owl habitat’ and ‘Road density,’ on the other hand, are clearly variables
21 that can be quantified.” *Id.*

22 Here, KS Wild contends that the Final Environmental Impact Statement contains
23 only a relative comparison of the alternative actions without providing measurable or
24 quantifiable differences. The Court does not agree completely with this representation. As
25 examples, the Court looks to the two sample variables from *Klamath-Siskiyou* that can be
26 quantified: the amount of suitable owl habitat and road density.

27 As to owl habitat, the *Klamath-Siskiyou* court stated that while a “calculation of the
28 total number of acres to be harvested . . . is a necessary component of a cumulative effects

1 analysis, [] it is not a sufficient description of the actual environmental effects that can be
2 expected from logging those acres.” *Id.* at 994-95. Here, the Services did more than
3 restate the number of acres to be harvested. As they point out, the Final Environmental
4 Impact Statement’s analysis of the northern spotted owl includes objective data depicting
5 the projected acreage of suitable habitat under different alternative actions, including the
6 “No Action Alternative” and the “Proposed Action.” AR 38562-67. The Court finds this
7 satisfies the “quantified or detailed” standard under *Neighbors* and is consistent with
8 *Klamath-Siskiyou*.

9 As to road density, “stating the total miles of roads to be constructed is similar to
10 merely stating the sum of the acres to be harvested—it is not a description of *actual*
11 environmental effects.” *Klamath-Siskiyou*, 387 F.3d at 995. Here, the Final
12 Environmental Impact Statement describes a plan for road construction under the “No
13 Action Alternative” and states that “[n]ew road construction is anticipated to average less
14 than 1 mile per year.” AR 38541. Under this alternative, because there will be a “gradual
15 reduction in active road mileage over the next 50 years,” the “road density in the Plan Area
16 would decrease slightly in the future compared to existing conditions.” AR 38541. Even
17 though road density is “clearly a variable[] that can be quantified,” *Klamath-Siskiyou*, 387
18 F.3d at 994 n.1, the Final Environmental Impact Statement does not do so. It also fails to
19 quantify the road density under the various alternative plans, including the “Proposed
20 Action.” The Services needed to do more.

21 In sum, the Court agrees partly with KS Wild that there are certain environmental
22 effects in the Final Environmental Impact Statement that should have been quantified.
23 Instead, of using “[g]eneral statements about possible effects,” *Neighbors*, 137 F.3d at
24 1380—like the claim that road density will “decrease slightly”—the Services must
25 quantify environmental effects “susceptible to easy measurement,” *Klamath-Siskiyou*, 387
26 F.3d at 994 n.1. The Services’ failure to do was arbitrary and capricious.

27 //
28

V. CONCLUSION

For the reasons explained in this Order, the Court GRANTS KS Wild's summary judgment motion and finds the incidental take permits issued by the Services, the biological opinion issued by NMFS, and the Final Environmental Impact Statement invalid. But the Court DENIES KS Wild's summary judgment motion to invalidate the FWS biological opinion. Accordingly, the Services' cross-motion for summary judgment is DENIED as to all issues except the claim involving the FWS biological opinion's validity. As to that claim, the Services' cross-motion is GRANTED.

A. Summary of Findings

1. Endangered Species Act Claims: Northern Spotted Owl

- Incidental Take Permit Invalid: The Fish and Wildlife Service violated the Endangered Species Act by factoring the conservation efforts of non-applicant Forest Service into its § 10 analysis of applicant Fruit Growers' mitigation efforts. ESA § 10(a)(2)(B)(ii), 16 U.S.C. 1539(a)(2)(B)(ii) ("*the applicant* will . . . minimize and mitigate the impacts of such taking") (emphasis added). Incidental-take-permit applicants should not be permitted to piggyback off of the conservation efforts of their non-applicant neighbors.
- FWS Biological Opinion Affirmed: The Fish and Wildlife Service did not violate the Endangered Species Act when it issued a biological opinion that found Fruit Growers' Plan is not likely to jeopardize the continued existence of the northern spotted owl or result in the destruction or adverse modification of critical habitat. FWS relied on several factors to reach this "no jeopardy" finding. FWS did not base its analysis primarily on Fruit Growers' unenforceable commitment to reduce clearcutting and increase dispersal habitat.

2. Endangered Species Act Claims: Southern Oregon/Northern California Coast Coho Salmon

- Incidental Take Permit Invalid: The National Marine Fisheries Service violated the Endangered Species Act when it found Fruit Growers could adequately

1 minimize and mitigate the impacts likely to result from the taking. NMFS
2 concluded that the benefits of Fruit Growers' mitigation efforts would occur
3 over the duration of the permit's 50-year term. But because coho salmon have
4 only a three-year life cycle, NMFS should have evaluated the proposed action's
5 short-term impacts.

- 6 • NMFS Biological Opinion Invalid: The National Marine Fisheries Service
7 violated the Endangered Species Act when it issued a biological opinion
8 containing a "no jeopardy" conclusion without first evaluating the proposed
9 action's short-term impacts on coho salmon. The Ninth Circuit has stressed that
10 NMFS must consider near-term habitat loss to populations with short life cycles.
11 NMFS failed to do this here.

12 **3. National Environmental Policy Act Claims**

- 13 • Environmental Impact Statement Invalid: The Services failed to conduct a
14 cumulative effects analysis as to Fruit Growers':
15 a. timber harvest projects;
16 b. use of herbicides; and
17 c. water withdrawal projects.

18 This failure to sufficiently catalog past, present, and future projects or actions
19 related to these three areas and how they impact the environment renders the
20 Final Environmental Impact Statement invalid.

- 21 • Failure to Quantify Environmental Effects: The Final Environmental Impact
22 Statement is also invalid because the Services failed to quantify certain
23 environmental effects susceptible to measurement. General statements that
24 possible effects will be "reduced" or "minimized" is not enough.
- 25 • No Requirement to Disclose Economic Data: The Final Environmental Impact
26 Statement is not invalid because it failed to disclose economic data related to
27 applicant Fruit Growers. The Court could not find any case law or language in
28 the statute that persuasively suggests the Services must provide this information

1 in the environmental impact statement.

2 **B. Additional Briefing**

3 The Court orders the parties to brief two more issues.

4 **1. Remedy**

5 KS Wild and the Services requested an opportunity for additional briefing on
6 potential remedies. Dkt. Nos. 63 at 60, 73 at 25. The Court GRANTS the request for
7 additional briefing on the remedy issue.

8 **2. Claim Three**

9 The Services request summary judgment on claim three of KS Wild's complaint.
10 Dkt. No. 63 at 43. In their cross-motion, the Services assert that they are entitled to
11 summary judgment as to this claim because KS Wild failed to pursue it at summary
12 judgment. Indeed, KS Wild failed to brief this claim, which alleges that FWS violated
13 ESA § 7 by failing to prepare a legally sufficient incidental take statement. Dkt. No. 1 at
14 28.

15 In support of its position, the Services cite to *Greater Los Angeles Council on*
16 *Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1115-16 (9th Cir. 1987), where the court found
17 plaintiffs "waive[d] their constitutional claims by failing to press them adequately before a
18 court." *Id.* The Court's tentative view, however, is that the case is distinguishable—it
19 involved a plaintiffs' failure to pursue constitutional claims during trial, not at summary
20 judgment. *Id.*

21 In response, KS Wild states that whether it addressed claim three or not, the result is
22 the same: because it demonstrated that the FWS biological opinion's no-jeopardy
23 conclusion was arbitrary and capricious, both the biological opinion and the incidental take
24 statement are invalidated. Dkt. No. 73 at 24. (citing *Or. Natural Res. Council v. Allen*, 476
25 F.3d at 1037).

26 But in light of the fact that the Court did not invalidate FWS's biological opinion,
27 and given the parties' cursory treatment of this incidental-take-statement issue, the Court
28 seeks additional briefing as to why it should not grant summary judgment to the Services

on KS Wild's third claim. Additionally, the Court seeks additional briefing concerning why the *Zolin* case—or any other case articulating the waiver principle—should apply.

3. Briefing and Hearing Schedule

Both KS Wild and the Services will be permitted to submit a maximum of 15 pages to brief these two issues. How each side decides to allocate its writing space is entirely up to it. KS Wild must submit its brief within 14 days of this order. The Services must submit their brief within 14 days after KS Wild's brief has been filed. Fruit Growers may also submit a brief (no more than 10 pages) within 14 days after KS Wild's brief has been filed. No reply briefs will be permitted absent leave of court.

A hearing will be held on May 6, 2015, at 11:30 a.m. in Courtroom A, 15th Floor, U.S. District Court, 450 Golden Gate Avenue, San Francisco, California.

Given this Court's request for additional briefing, this Order is not a final appealable order.

IT IS SO ORDERED.

Dated: April 3, 2015


NATHANAEL M. COUSINS
United States Magistrate Judge